HO HUP CONSTRUCTION COMPANY BHD A

v.

GOVERNMENT OF MADAGASCAR & ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA B
JAMES FOONG JCA
ABDULL HAMID EMBONG JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEALS NO: W-02-1031-2006 & W-02-341-2007]
23 JULY 2009 C

CONTRACT: *Guarantee - Performance guarantee - Demand for payment - Termination of contract - Dispute referred to arbitration - Application to injuct bank from making payment under guarantee - Whether demands for payment valid - Whether principal could act against agent to make demand on guarantees* D

The appellant entered into three contracts ('contracts') to construct and rehabilitate roads in Madagascar. It signed the contracts with the Vice-Premature in charge of Economic Programmes, Ministry of Transport, Public Works and Land Development, Madagascar ('the Vice-Premature') as agent for the Government of Madagascar. The appellant requested Bumiputra-Commerce Bank Berhad ('the first respondent') to issue various performance guarantees ('the guarantees') as security for the performance of work under the contracts. Disputes arose over the performance of the contracts which resulted in the Vice Premature terminating the contracts and the disputes being referred to arbitration. The appellant applied to the High Court to injunct the first respondent from making payment under the guarantees until the arbitration proceedings were over and obtained an interim injunction until its application was heard. Unable to obtain payment under the guarantees, the Government of Madagascar ('the second respondent') intervened in the proceedings and set aside both the interim injunction as well as the appellant's main application for interlocutory injunctive relief. The High Court held that the performance guarantees were unconditional and not dependent on the outcome of the arbitration. In its appeal against the decision to the Court of Appeal, the appellant, *inter alia*, contended that: (i) the beneficiary under the guarantees was the Vice Premature and not the second respondent; and (ii) the second respondent failed to establish that the Republic of Madagascar was a foreign sovereign recognised by the Yang Dipertuan Agong. E F G H I

Held (dismissing appeals with costs)
Per Wan Adnan Muhamad JCA delivering the judgment of the court:

(1) The performance guarantees were payable without proof of any default on the appellant's part. (para 16)

(2) The demands for payment under the performance guarantees were valid and effective and were made by the Minister of Public Works and Transport as agent of the Government of Madagascar. In law, the principal could act against the agent to make a demand on the guarantees. (para 22)

(3) On the issue of sovereign immunity, the appellant had entered into the contracts with the Government of Madagascar with eyes wide open and with full knowledge of its sovereign status. (para 22)

For the appellant - M Nagarajah (Jasbeer Singh & Gerard Lourdesamy with him); M/s Jasbeer, Nor & Lee
For the 1st respondent - V Vijaykumar; M/s Albar & Partners
For the 2nd respondent - WSW Davidson (Y Ramachandran & Marion Qua with him); M/s Azman Davidson & Co

Reported by Ashok Kumar

JUDGMENT

Wan Adnan Muhamad JCA:

[1] These two appeals (W-02-1031-2006 and W-02-341-2006) arose from the same suit. At the request of the parties, the appeals were heard together. These are appeals against the decision of the learned judge of the High Court dismissing the appellant's application for interlocutory injunctive relief application for leave for the appellant to adduce further evidence and application to add Government of Madagascar as a party to the originating summons.

[2] The factual background can be stated briefly as follows:

[3] The appellant entered into three contracts for the construction and rehabilitation of roads in Madagascar. These contracts are numerically numbered Contract No. 410/SEP, Contract No. 411/SEP and Contract No. 412/SEP (hereafter referred to as the "contracts"). These contracts were entered between the appellant and the Vice Premature In Charge of Economic Programmed, Ministry of Transport, Public Works and Land Development, Madagascar (the "Vice Premature").

[4] Pursuant to its obligation under the contracts, the appellant requested Bumiputra Commerce Bank Berhad (the first respondent) to issue various bank guarantees as security for the performance of its work under the contracts. The appellant's cause of action is based on these guarantees. A

[5] A dispute has arisen between the Vice Premature and the appellant over the performance of the contracts that resulted in the termination of the contracts by the Vice Premature on 13 February 2006. The appellant had invoked the dispute resolution provisions in the contracts and as such any difference or dispute between the parties should be referred to arbitration under the Rules of the International Chamber of Commerce. B C

[6] The appellant filed an originating summons dated 21 March 2006 against the 1st respondent bank claiming *inter alia* declaratory relief that the bank guarantees were conditional guarantees. The appellant also sought injunctive relief to prevent payment under the bank guarantees pending the trial or arbitration of its disputes with the Vice Premature. Neither the Government of Madagascar nor the Vice Premature was named as a party in the originating summons. D

[7] At the same time the originating summons was filed, the appellant filed a summons-in-chambers application seeking interlocutory injunctive relief to restrain payment of the bank guarantees pending judgment or any further order. E

[8] On 31 March 2006, the High Court granted the appellant an *ad interim* injunction pending the hearing of its summons-in-chambers for injunctive relief. This order was extended on 25 March 2006. F

[9] Subsequent to the filing of the originating summons and the summons-in-chambers application for injunctive relief and the granting of the two *ad interim* injunction orders, the Government of Madagascar (the second respondent) demanded payment under the bank guarantees. The 1st respondent advised the 2nd respondent's solicitor that it was unable to make payment under the bank guarantees because of the existence of the *ad interim* injunction orders. G

[10] As a consequence of the appellant's failure to name the Vice Premature or the Government of Madagascar as a party to the originating summons, the Government of Madagascar filed a summons-in-chambers application on 25 July 2006 to be added as a party to the originating summons to ensure that its interests under the bank H I

guarantees and contracts were protected. This application also sought the High Court's leave to enable the Government of Madagascar to respond to the appellant's summons-in-chambers application for injunctive relief.

[11] On 22 September 2006 the High Court allowed the Government of Madagascar's application to be added as a party to the originating summons and to be allowed the right to respond to the appellant's summons-in-chambers application for injunctive relief. This is the subject of Civil Appeal No. W-02-1031-2006.

[12] In the course of proceedings for the appellant's summons-in-chambers application for injunctive relief, the appellant filed three consecutive summons-in-chambers applications to adduce further evidence. The first was withdrawn after the Government of Madagascar agreed to allow the appellant to file a further affidavit. However, the Government of Madagascar opposed the appellant's subsequent two summons-in-chambers applications.

[13] On 13 April 2007 the High Court dismissed the appellant's summons-in-chambers application for interlocutory injunctive relief and the appellant's two outstanding summons-in-chambers applications to adduce further evidence. The *ad interim* injunction preventing payment under the bank guarantees was also dissolved at the same time.

[14] The appellant claims that the bank guarantees were conditional guarantees and as such it would be unconscionable or unfair for the Government of Madagascar to make a call on the guarantees while the underlying dispute between the parties to the contracts has yet to be determined in the arbitration proceedings before the ICC.

[15] The respondent contended the appellant's claims are baseless. The operative parts of Performance Guarantee No. TFOO1G917960 and Performance Guarantee No. TFOO1G917962 are worded virtually identically, the only significant differences being the amount claimed in each guarantee and their respective expiry dates. The guarantee is worded in the following way:

> At the request of the Contractor, we BUMIPUTRA-COMMERCE BANK BERHAD of Trade Services Centre, Level 5, No. 6, Jalan Tun Perak, 50050 Kuala Lumpur, Malaysia hereby irrevocably undertake to pay you any sum or sums not exceeding in total an amount of United State Dollars: Three Million Five Hundred Fifty Two Thousand (USD3,552,983.57) only such sum being payable upon receipt by us of your first demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligations under the Contract, without **your needing to prove or to show grounds for your demand or the sum specified therein.**
>
> …

This guarantee is subject to the Uniform Rules of Demand Guarantees, ICC Publications No. 458, except that subparagraph (ii) of Sub-article 20(a) is hereby excluded.

This guarantee shall be governed by and construed in accordance with the laws of Malaysia

[16] It is clear from reading of the extract from Performance Guarantee No. TFOO1G917960 set out above that it is payable without proof of any default on the appellant's part.

[17] As well as being governed by Malaysian law, the performance guarantees are also subject to the International Chamber of Commerce's Rules.

[18] The appellant claims that the Government of Madagascar and its Ministry of Public Works, Transport and Meteorology are not beneficiaries under the bank guarantees. The appellant maintains that the beneficiary under the said guarantees is the Vice Premature.

[19] The respondents submitted that the appellant's argument has no basis for the following reasons:

(a) The appellant referred to the Government of Madagascar in at least one document as the "client/government", thus acknowledging that the Government of Madagascar is the party to the contracts and the beneficiary under the bank guarantees underlying the contracts.

(b) The ongoing disputes under the contracts are being arbitrated in Paris between the Government of Madagascar and the appellant. This is only possible because the Government of Madagascar is a party to the contracts and, as a consequence, the beneficiary under the bank guarantees which the contracts underlie.

(c) The contracts very clearly state that they have been entered into by the Vice-Premature for and on behalf of the State of Madagascar. Hence, the Vice-Premature clearly was not a party to the contracts but signed the contracts as agent of the Government of Madagascar. As the Vice Premature is only agent of the Government of Madagascar under the contracts, it must follow that his name also appears in the bank guarantees as the agent of the Government of Madagascar. It is not possible for the Vice Premature to be named in the contracts and the bank guarantees under different legal capacities as the purpose of the bank guarantees is to provide security to one of the parties under the contracts.

(d) In any event the Vice Premature has no legal or constitutional existence that is separate from the Government of Madagascar. Under the laws of Madagascar, the Vice Premature is part of the Government of Madagascar.

[20] The appellant submits that the bank guarantees are not assignable. The respondent rebuts that contention as there is no question of any assignment as the Government of Madagascar is the beneficiary under the bank guarantee.

[21] The appellant contends that the Government of Madagascar has failed to establish that the Republic of Madagascar is a foreign Sovereign recognised by our Yang Dipertuan Agong. The respondent's answer to that was, that the doctrine of Sovereign immunity applies to the appellant's cause of action and accordingly the Government of Madagascar cannot be impleaded in a foreign court unless it has submitted to that foreign jurisdiction.

[22] We agree with the decision of the High Court on the following grounds:

(a) The demands for payment under the performance guarantees are valid and effective and were made by the Minister of Public Works and Transport as agent of the Government of Madagascar, a party of the contract entered into with the appellant upon which the performance guarantees in question were issued. In law, the principal can act against the agent to make a demand on the guarantee.

(b) On the issue of sovereign immunity, the appellant had entered into the contracts with the Government of Madagascar with eyes wide open and full knowledge of its sovereign status.

[23] For the reasons above, for Appeal No. W-02-1031-06 we dismissed the appeal with costs and ordered the deposits for this appeal to be remitted to the respondent on account of taxed costs. For Appeal No. W-02-341-07, we dismissed the appeal with costs and ordered the deposit for this appeal to be remitted to the 2nd respondent on account of taxed costs.